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No. 94-1889

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners,

v.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BUDD, LARNER, GROSS, ROSENBAUM GREENBERG & SADE
Attorney for Respondents Perini Corp. and Stevens & Wilkinson, Inc.
200 Lake Drive East
Suite 100
Woodland Falls Corporate Park
Cherry Hill, NJ 08002
609-667-3800

DONALD P. JACOBS, Esquire
Counsel of Record

MARC I. BRESSMAN, Esquire
On The Brief

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the District Court, and the United States Court of Appeals for the Third Circuit, appropriately determined that Respondents were entitled to Summary Judgment, where Petitioners failed to proffer expert testimony in support of their allegations of negligence and breach of warranty against the general contractor and the architect.

COUNTERSTATEMENT OF PARTIES

Petitioners have needlessly confused the parties. The only appropriate parties to this Petition are the Petitioners, who are intervention plaintiffs, Perini Corporation, the general contractor, and Stevens & Wilkinson, Inc., the architect. Meridian Mortgage Corporation, the Atlantic Palace Condominium Association and Metalan Erectors, Inc., were not parties to the Appeal to the Third Circuit, and are not appropriate parties in this matter.

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B. The other issues raised by Petitioner were not pleaded or argued at the Trial Court, or argued at the Court of Appeals level, and exceptional circumstances do not exist to warrant review of said claims in the United States Supreme Court..... 4

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COUNTERSTATEMENT OF THE CASE

In this matter, Petitioners were permitted to intervene at the trial level, along with eleven (11) other condominium unit owners of the Atlantic Palace Hotel-Condominium Complex, in *Donald W. Wright, et al. v. Perini Corp., et al.*, Civil Action Number 90-189 (JEI) (consolidated), a suit by approximately 200 unit owners, which had been brought against Respondents Perini Corporation, the general contractor of the Atlantic Palace, and Stevens & Wilkinson, the Atlantic Palace's architect. The *Wright* suit, and the Petitioner-Intervenors, alleged negligence and breach of warranty in the construction and design of the complex.

After an extensive mediation process, only the Petitioners proceeded with the action, as the remaining parties to the consolidated actions settled their claims.

The United States Magistrate Judge who was managing discovery ordered the remaining parties to comply with deadlines with respect to submission of experts' reports. Despite Petitioners' acknowledgement that "the liability, causation and damages issues require expert testimony," (Pa. 19)[1] the Petitioners failed to submit experts' reports in support of their allegations of negligence and breach of warranty against Respondents, the general contractor and architect of the condominium project.

On June 25, 1993, the Honorable Joseph E. Irenas, U.S.D.J., granted Respondents' Motion for Summary Judgment against Petitioners. By Judgment Order dated

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[1] "Pa" refers to Petitioners' Appendix.

December 29, 1994, without Opinion, the United States Court of Appeals for the Third Circuit affirmed the District Court's grant of Summary Judgment in favor of Respondents.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE LOWER COURTS' DECISION GRANTING, AND AFFIRMING, SUMMARY JUDGMENT IS CORRECT, AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, AND THE OTHER ISSUES RAISED BY PETITIONERS WERE NEVER PLEADED IN THE DISTRICT COURT, AND NEVER ARGUED IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS

A. The Decision by the District Court in Granting Summary Judgment, and the affirmance by the United States Court of Appeals for the Third Circuit, was correct and not in conflict with any decisions of this Court with respect to summary judgment motions in civil actions.

As the United States Magistrate Judge who authored the Report and Recommendation dated June 17, 1993, recognized, petitioners faced a significant burden in attempting to prove negligence and breach of warranty with respect to the construction and design of a 30 story hotel-condominium complex. While the fact of water infiltration was admitted by all, the causes of the infiltration, whether by design, engineering or construction, were hotly contested. Respondents had proffered substantial and lengthy expert reports disputing their liability; the general contractor blamed the designers, the

designers blamed construction. The Trial Court's decision to grant Summary Judgment, and the Court of Appeals' affirmance of that decision, was consistent with the legal principles set forth in this Court's recent trio of summary judgment cases, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Trial Court, properly applying the legal principles set forth in the above cases, determined that without expert testimony, petitioners would be unable to produce substantive evidence that either or both of the Respondents failed to design or construct the project in an appropriate manner. Without the benefit of expert testimony, the Trial Court concluded that the jury would be set adrift with respect to the causes of the water infiltration, and the fault, if any, of the Respondents. As this Court stated in *Anderson, supra*, 477 U.S. at 252:

> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

In this case, without expert testimony, Petitioners could not carry the burden of proving who, if anyone, was at fault.

B. The other issues raised by Petitioner were not pleaded or argued at the Trial Court, or argued at the Court of Appeals level, and exceptional circumstances do not exist to warrant review of said claims in the United States Supreme Court.

Petitioners raise, for the first time, allegations that Respondents breached the Interstate Land Sales Act, *15 U.S.C. § 1701, et seq.*, and the criminal statute dealing with frauds and swindles by mail, *18 U.S.C. § 1341*. Allegations concerning those statutes were never pleaded by Petitioners in the District Court, and never argued in either the District Court or the Court of Appeals. No exceptional circumstances exist to warrant review of these new claims in the United States Supreme Court. *U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599 (1994).

Petitioners also argue, again for the first time, that the District Court and the Third Circuit erred in failing to consider Petitioners' rescission claims. Petitioners never pleaded rescission in the District Court, and never argued for rescission there or in the Court of Appeals. Accordingly, the United States Supreme Court need not review said claim. *Id.*

CONCLUSION

For the foregoing reasons, Respondents Perini Corporation and Stevens & Wilkinson, Inc. respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DONALD P. JACOBS, Esquire
BUDD, LARNER, GROSS, ROSENBAUM, GREENBERG & SADE
200 Lake Drive East, Suite 100
Woodland Falls Corporate Park
Cherry Hill, New Jersey 08002

DONALD P. JACOBS, Esquire
Counsel of Record

MARC I. BRESSMAN, Esquire
On The Brief

Dated: June 13, 1995